Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NORMAN K. JONES,

Petitioner,

v.

THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY (PMBDA); ISABELLE SMITH; EUGENE HESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Under Federal Rule of Civil Procedure 56, may disputed material facts, either be ignored or construed by the Court in the favor of the movant for summary judgment?

II.

Under the Americans with Disabilities Act, Title II, must a plaintiff survive summary judgment when he is able to prove that discrimination played a role in the adverse action against him?

III.

Under the Americans with Disabilities Act, Title II, must a Plaintiff survive summary judgment when he proves, either with direct or circumstantial evidence that the reasons given for the adverse action are pretextual, or which a reasonable jury could find pretextual?

IV.

Under the Americans with Disabilities Act, Title II, may the Defendant be excused of its burden to prove, what if any of its program requirements are "essential eligibility requirements"?

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OPINIONS BELOW

The order and opinion of the Court of Appeals which is not reported is set out at pp. 1a-17a to the Appendix to the Petition for Writ of Certiorari. The order and opinion of the District Court granting Respondent's motion for summary judgment and denying Petitioner's motion for summary judgment, which is not reported is set out at pp. 18a-33a to the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on July 28, 2000. A timely petition for rehearing and suggestion for rehearing en banc were denied on October 31, 2000. The order denying the petition for rehearing is set out at pp. 34a to the Appendix to the Petition for Writ of Certiorari. Jurisdiction of the Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133 provides, in pertinent part:

12131

(2) Qualified individual with a disability.

The term a qualified individual with a disability means an individual with a disability who, with or without reasonable modification to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of

services or the participation in programs or activities provided by a public entity.

12132 Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Federal Rule of Civil Procedure 56, provides in pertinent part:

(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and, that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner, Norman K. Jones, II, (Mr. Jones or Jones) brought this action for disability discrimination against Respondent the Pennsylvania Minority Business Development Authority (PMBDA) for denying his sole shareholder corporation, Street Sounds Recording and Production Company (Street Sounds) the benefit of a Sixty Thousand Dollar loan under its' Direct Loan Program R. 33-47, 50, 602-605. After the parties had discovery, the District

Court denied Plaintiff's summary judgment motion and granted Defendant's summary judgment motion.

After receiving the evidence de novo, the Third Circuit affirmed the District Court's ruling concluding that:

(1) "Jones failed to meet the requirements set forth in the commitment letter and, consequently did not qualify for the PMBDA loan". (app. 31a);

(2) "we reject Jones' contention that the collateral and equity injection requirements were not "essential" to receiving the PMBDA loans". (app. 32a);

(3) "The few times that Jones' disability was mentioned in connection with his loan application, therefore do not support his contention that he suffered an "adverse . . . decision as a result of discrimination". (app. 33a) Mr. Jones Petition for Rehearing was denied on October 31, 2000. What follows is a summary of the evidence offered to the District Court at the summary judgment stage, which shows that Jones proved that disability discrimination played a role in the decision against him.

B. Direct Evidence of Disability Discrimination

Mr. Jones became disabled in 1991 while employed at the United States Postal Service acquiring an adjustment disorder with mixed emotional features, and generalized anxiety disorder and post traumatic stress disorder. R. 22-24, 124-26, 149-51, 934-83.

Although he was disabled from his employment that he worked under supervision, according to his psychologist,

Dr. Cimmet, he was not restricted from self-employment. In 1995, Mr. Jones applied for a loan from PMBDA for his sole stock shareholders corporation, Street Sounds Recording and Production Company, which he had created prior to becoming disabled. The corporation had never earned any significant profit and was essentially a "paper corporation" R. 39, 46, 52, 125-26. As a part of PMBDA's loan application process Jones had to reveal all of his sources of income which included Federal Workmen's Compensation payments he was receiving as a result of his disability R. 152-53, 321-23.

The Executive Director of the PMBDA, Isabelle Smith upon becoming aware of the disability, told her subordinate that PMBDA could not make a loan to Jones because he was disabled. The following are excerpts of the deposition testimony of Ms. Smith:

> Q: Wasn't it a requirement of the PMBDA that any person who received a loan from the PMBDA quit their full time employment and devote full-time to the loan project?
>
> A: Yes. That's one of the requirements, which is why I keep telling you — I have come back as to if Mr. Jones was eligible, because he was getting disability payments, and if those disability payments were going to continue. R. 574.
>
> Q: But you referred to his mental disability on <u>several</u> (emphasis-added) occasions in writing, did you not?
>
> A: That was in reference to whether he was qualified for a PMBDA loan. R. 518.

Q: Did anyone tell you that they suspected that Mr. Jones might not be able to manage Street Sounds because of a disability?

A: No. R. 520.

Q: To your knowledge, was anyone else concerned about the issue of mental disability or disability?

A: Yes.

Q: Who?

A: Two of the Board members. R. 522.

Q: Do you recall discussions or communications or communicating with Emily White about the issue of disability?

A: I may have in the context as to whether he was able to manage the business. R. 572.

Keblin Carolina, PMBDA's Eastern Regional Supervisor, testified in his deposition as follows:

A: Well it was an ongoing battle (emphasis added) as I recall from the beginning of the project, going back prior, probably the latter part of '94', early '95' regarding the applicant's qualifications in general. There was none indicated in the application about a disability that Mr. Jones — a disability income that Mr. Jones was receiving, and Isabelle always (emphasis added) questioned in the beginning whether or not this applicant was eligible for financing due to this disability (emphasis added) . . . I had no indication that there was a mental disability in my mind R. 161-62.

A: I had a discussion with Isabelle on this project . . . and her first concern was a question regarding disability, that was an issue. R. 185.

Q: Okay do you have any specific recollection of what was discussed regarding his alleged disability?

A: Well, the first comment I remember hearing from Isabelle Smith, and I'm not sure of it was only in writing or if it was verbally communicated to me was that we cannot help this project because he was on disability. (emphasis added). He was totally disabled or on permanent disability, something to that effect.

Q: But the discussion and the e-mail would have been, if not contemporaneous about the same time?

A: Yes, yes. Because it was discussion surrounding disability. But initially it was like we can't help this guy or we can't do a deal because there is disability (emphasis added). I said well the disability as I understand it was stress related to his prior work experience. R. 191.

Q: Okay well let me ask you this, though. When you first had your conversation with Isabelle Smith and she raised in the context of being able to manage the business (emphasis added)

A: No. Just used in the context of seeing disability in the application and you know, just shooting from the hip saying, well, we can't help, this guy is on permanent disability, without finding out what the disability is . . ." R. 194.

Q: Did you tell Isabelle Smith what your understanding of his disability was?

A: Yes, I did.

Q: So, I know from Isabelle's perspective if she thought his disability precluded him from running this business, it would have been better to say well, Kelbin, do you have any concern about . . . R. 198.

A: Well, the time frame would be from the very beginning, okay starting with the issue of the disability. In all my years of experience as a lender, what I found is that she (emphasis added) only needs to find one reason to turn down a deal. And you know, you can do the smoking mirrors piece, but if you have that one issue, you could have been disapproved on that one issue . . . I mean you can have all of your collateral in place, all of your equity in place, but you can find some other reason not to do a deal. R. 220.

Mr. Carolina testified that if Ms. Smith had any legitimate concern about Mr. Jones' worker's compensation status, that should have been referred to PMBDA's legal office. He did not recall this occurring. R. 210.

Mr. Carolina warned Ms. Smith about her negative posture on disability and told her he observed no impediment to Jones managing Street Sounds. R. 470.

Ms. Smith was not legitimately concerned with whether Jones' disability income might be discontinued if Street Sounds received a loan, as she did not even bother to investigate the alleged issue with the United States Department of Labor R. 575-76. Ms. Smith required that Mr. Jones have an independent source of income other than

profits from the loan project, his disability income, which nondisabled applicants need not have. R. 655-56.

Ms. Smith wrote an e-mail to Keblin Carolina telling him that Jones' disability was a problem, three days before the loan project was submitted for initial approval to PMBDA's Loan Evaluation Committee. R. 317.

Ms. Smith and Ms. Chavez wrote notes on the loan application "Turnover Checklist" (a PMBDA mechanism addressing the various items that needed to be completed to secure the loan), essentially questioning Jones' ability to manage his business because he was disabled. At the Loan Evaluation Committee Meeting, Smith and Karen Shaffer, another PMBDA employee questioned Jones in front of a room of people about his disability. R. 123. Other PMBDA employees involved in the loan process believed Jones' disability was a "problem". R. 521-23.

In April 1996, while Jones was in the process of completing loan closing requirements, Smith wrote an e-mail to Emily White, Chairman of the PMBDA Board of Directors, misrepresenting that Jones did not have enough money to make an equity injection into the loan project as allegedly required by PMBDA and again citing disability as "adverse information" and a possible reason to rescind the loan commitment. R. 775.

In August 1996, during a meeting with PMBDA employee Eugene Hess, Hess inexplicably asked Jones whether he was still receiving disability income. In the same conversation, Hess told Jones that even if he met all of the loan requirements, the loan was not guaranteed to close. R. 132. Shortly after that meeting, Smith met with Hess to discuss loan rescindment. She also met with White to discuss

the same, referencing disability as an issue R. 562-64, 570-72.

PMBDA had anti-discrimination policies, including for disability and its' requirements are silent on the issue of whether disability can be a possible disqualifier for loan eligibility. R. 161-63.

C. PMBDA's Articulation Of Reasons For Loan Commitment Rescission

Despite Isabelle Smith's denouncement of loaning to Street Sounds, PMBDA's internal structure allowed Kelbin Carolina to more or less attempt to push the loan package through the various levels of approval without Ms. Smith's blessing and without the blessings of other specific persons who believed that Jones' disability disqualified him for loan eligibility. Mr. Carolina presented the loan package first to PMBDA Loan Evaluation Committee (LEC) on July 13, 1995, which approved sending the package to the PMBDA Board of Directors for subsequent review. Isabelle Smith was not a voting member of the LEC. R. 635. At the time of the LEC, Mr. Jones was required to pledge collateral. He did so consisting of two pieces of real estate he owned, including his home. R. 127, 176, 784. PMBDA was aware that one of the properties might be restricted from a second mortgage by it, because it was a Veteran's Affairs property R. 176. Additionally, Ms. Smith required that Jones designate a business address other than his home address, although PMBDA had no policy against home based business and had funded them in the past. R. 121-29, 347, 471-72, 643. Mr. Jones designated his apartment at 2318 Rosemore Avenue, Glenside, PA as his business address. R. 472. He lived in one of his other properties, a multiple unit home,

which he had previously rented out, foregoing rent for the room he lived in throughout the loan process. R. 128.

On July 27, 1995, the PMBDA Board of Directors (Board) received the Street Sounds application which included its' Business Plan and Financial Forecast. The Board also reviewed an assessment of the proposed loan project created by PMBDA's own financial consultant, EXICO. EXICO documented and presented the following to the board: (1) that Street Sounds was a "new" business for which historical financial information was not applicable; (2) that Jones had significant experience in the music industry (he had produced successful records for another recording label); (3) that Street Sounds had done no business in the previous three years because it was nonfunctional.

The Board discussed that there was a real estate collateral deficiency of around $24,000.00 for the $60,000.00 loan. To supplement the real estate collateral, the Board decided that Street Seconds' recording contract with performer Mia Evans would be assigned to PMBDA as collateral. R. 346-49, 372-76. Additionally, Mr. Jones pledged approximately $12,000.00 in business equipment, including musical recording equipment, office equipment and furniture. Due to Street Sounds lack of activity, practically, there was little depreciation to the equipment. R. 332, 356. The PMBDA Board of Directors approved the loan commitment of $60,000.00, despite the real estate collateral deficiency of around $24,000.00. R. 372-76. Again, as with the LEC, Isabelle Smith was not a voting member of the Board, nor did she present the loan package to it. R. 292, 635.

On July 27, 1995 Ms. Smith sent Mr. Jones a letter informing him that the loan commitment had been extended

and also cautioning him not to make significant business expenditures in reliance on the loan commitment without PMBDA's authorization. R. 396.

On August 18, 1995, PMBDA sent Mr. Jones a loan commitment letter, which purported to contain the required loan conditions. R. 783-89.

From around September 15, 1995 when Mr. Jones signed the commitment letter, until around April 1996, Jones set about accomplishing the items in the commitment letter. During this time, Mr. Carolina who had worked closely with Mr. Jones on the loan application, left the employment of PMBDA. For unknown reasons for a period of time, there appeared to have been nobody assigned to process the Street Sounds application and field Mr. Jones' questions about the requirements.

Attempts were made to schedule loan closings, one finally occurring on April 3, 1996. Although Mr. Jones had been working with PMBDA's legal counsel Nwenda Adele, Mr. Adele did not attend the closing, rather PMBDA's only representative there was its' escrow agent, Mr. Osunipebi. R. 824. As of April 3, 1996, Mr. Jones had still not been able to receive PMBDA's requested mortgage waivers on the properties he pledged as collateral (although the waiver on 450 E. Walnut Lane, his home was received shortly thereafter). R. 130-34, 825-26.

At the April 3, 1996 closing, Mr. Osunipebi escorted Mr. Jones to Mellon Bank, Cheltenham, PA, for the purpose of opening up an escrow account to deposit the loan proceeds and Mr. Jones equity injection of twenty-five percent of the project cost, or $20,000.00. However, because Mellon Bank refused to sign PMBDA's anti-discrimination policy, Mr.

Osunipebi refused to open the escrow account and left with PMBDA's check. Nor did he attempt to open the escrow account at another bank R. 130-31, 823. Under PMBDA's written procedure, it was its' responsibility to establish and manage the escrow account. R. 245, 793.

Shortly after closing, PMBDA required Mr. Osunipebi to return the loan check to Harrisburg. R. 823.

Ms. Smith and Mr. Hess both informed Emily White, chairman of the PMBDA Board of Directors, that Mr. Jones did not have the required money for the equity injection at the time of the April 3, 1996 closing. R. 367, 369, 775. Ms. Smith sent e-mail to Ms. White criticizing the efficiency of the entire loan project and citing disability as adverse information and asking if the loan could be pulled back. R. 775.

Mr. Hess wrote to Ms. Smith, that Street Sounds was supposed to have been making profits (despite EXICO's presentation that it was a new business). R. 344, 346, 349.

Mr. Hess told Mr. Jones that a new closing would be scheduled and that a new commitment letter would be written R. 790. On April 26, 1996, Ms. Smith wrote Mr. Jones a letter requiring him to pledge substitute collateral for the Veteran's Affairs' property at 6013 Magnolia Street. She also required that he use business expenditures, rather than cash to show his equity injection. R. 774.

At Mr. Jones' request, PMBDA revised the use of funds for the loan. Mr. Jones requested $20,000.00 for unrestricted working capital. PMBDA allowed $10,000.00. R. 344, 376.

Mr. Jones sent in receipts and documentation reflecting that he had already injected $33,000.00 into Street Sounds. R. 797. PMBDA told him that only expenditures after July 1, 1995 would be credited. R. 136. Mr. Jones provided receipts for business expenditures for $11,000.00 and the corporation's purchase of equipment from stockholder (Jones) in the amount of approximately to $11,000.00. R. 335-37, 795. These were post July 1, 1995 expenditures. Mr. Hess acknowledged in writing that the business expenses exceeded $20,000.00. R. 795.

Regarding the required substitute collateral, Jones pledged 6009 Magnolia Street, which he had purchased as a contingency in case 6013 Magnolia Street could not be pledged. The 6009 Magnolia Street property was professionally appraised at a slightly higher value than that of 6013 Magnolia Street. R. 776, 791. Mr. Jones spent $5,000.00 in closing costs for the property which he informed PMBDA would be used for a rehearsal studio. R. 379, 382-94.

In early August 1996, Ms. Smith told Mr. Jones he must come from Philadelphia to Harrisburg for a meeting with Mr. Hess and her, or that the loan commitment would be immediately rescinded. R. 132. Mr. Jones appeared for the meeting on August 12, 1996 and met with Mr. Hess. Ms. Smith was not at the meeting. At the meeting, Mr. Hess asked Mr. Jones whether he was still receiving disability income and told him that even if all of the loan requirements were met, the loan still was not guaranteed to close. R. 132.

In/around August-September 1996, Ms. Smith met with Mr. Hess and Emily White to discuss loan commitment rescindment, referencing disability as an issue of consideration R. 562-64, 570-72. After consultation with

Hess, she wrote Mr. Jones on September 9, 1996, informing him that the loan commitment would be rescinded, essentially citing three reasons as follows: (1) failure to show the ability to make a $20,000.00 equity injection into the loan project; (2) insufficient collateral; (3) likelihood that based on previous lack of profits, that the business could not repay the loan R. 778-79.

Mr. Jones' attorney Mr. Harper wrote a letter to Ms. Smith requesting reconsideration of her decision essentially stating the following: (1) that PMBDA had told Mr. Jones that his preloan expenditures could be used for the equity injection, that PMBDA had already credited at least $11,000.00 for equity by its' own admission and that Mr. Jones could if necessary make the equity injection in cash; (2) that Ms. Smith's letter did not accurately reflect the level of collateral pledged, nor that previously excepted by the PMBDA Board of Directors, and that if all the collateral were counted the loan was almost fully collateralized; (3) that Street Sounds had been presented as and accepted as by the Board of Directors as a new business for which no historical financial information was applicable. R. 780-81. Ms. Smith refused the request for reconsideration and personally presented her resolution for loan commitment rescission to the Board of Directors on September 26, 1996. There, she stated and wrote that Street Sounds failed to show the ability to make the equity injection, did not pledge sufficient collateral and did not show the ability to repay the debt. R. 602-05.

D. Petitioner's Evidence of Pretext

Mr. Jones challenged as downright fabrications practically every item of Defendant's evidence. Mr. Jones provided evidence, including the direct evidence of disability

animus, that PMBDA, through Ms. Smith, Mr. Hess, Ms. Chavez, Ms. White and others deliberately acted to confound him throughout the loan process.

First, although Mr. Jones informed PMBDA that he planned to operate the business from his home, arbitrarily PMBDA required that he designate a separate business address from his home, causing him to forego rent in the property he used as his residence. R. 38-54, 128-29, 153-54, 347, 643.

A PMBDA employee falsely documented that PMBDA did not fund home based business. R. 339. Mr. Carolina deposed this was patently false, that not only did PMBDA's regulation not restrict such funding, but that PMBDA had funded other home based businesses. R. 471-72.

Early in the loan process, as per PMBDA's requirement, Mr. Jones provided bank account statements reflecting money and other easily liquidable assets totaling around $27,000.00, which was to be used to make the $20,000.00 equity injection. R. 325-329. As of April 3, 1996, the closing and September 26, 1996, the loan rescission, Mr. Jones had over $20,000.00 available for an entire cash equity injection if necessary. R. 415-461. As late as September 26, 1996, he had cash in bank accounts, liquidable stock and mutual funds, and a line of credit exceeding $5,000.00. R. 417, 421, 431-34, 440, 447, 457. In/around April 1996, before the closing Mr. Jones provided PMBDA with documentation reflecting his ability to make an entire cash equity injection at the closing. R. 6633-34.

Ms. White instructed Ms. Smith to review the Street Sounds file to see where the equity injection would come from. Ms. Smith refused to do so. R. 692-93.

Despite this, both Smith and Hess continued to misrepresent to the LEC and the Board that Jones simply did not have the money for the equity injection. R. 367, 369, 774-75. Mr. Osunipebi, the only PMBDA agent at the April 3, 1996 closing, testified that he did not know one way or the other whether the money was available because they never got to the stage of depositing monies. R. 807-09.

By PMBDA's own procedures a loan applicant need not prepare the ability to make the equity injection prior to closing. R. 783-89, 846. Even Ms. Smith testified regarding proof of equity:

> "It could be done at closing. They had to have proof of it when they were applying for the loan". R. 546.

Therefore, after Jones had submitted his bank statements at the onset of the application process, he was not required to again prove the ability to make the equity injection until the time of closing.

Despite, PMBDA's contentions about a cash equity injection, its' own procedures allowed the injection to be done by all cash, all business expenditures, including expenditures predating the loan application date, or a combination of both. R. 550, 600-601. As stated above, Mr. Hess documented that Street Sounds had provided proof of business expenditures over $20,000.00 R. 795. There is absolutely no evidence that Mr. Hess rejected any of the "paid in capital."

As stated above Smith admitted that Street Sounds showed proof of $11,000.00 in business expenditures. Mr. Carolina deposed that additionally credit should have been extended for the pledged business equipment and furniture, regardless of when it was purchased, if it was not fully depreciated. PMBDA's procedure of valuing equipment was at fifty percent of the purchase price. R. 353, 476, 856. In fact in the August 18, 1995 commitment letter, the equipment was counted as collateral and valued at $5,000.00. R. 783-84. It strains belief how the equipment could have a value for collateral purposes but not for equity, particularly since it was the very equipment which would be used to produce the music, the purpose of the loan project. At a minimum equity credit of $5,000.00 should have been extended for the equipment. Mr. Jones purchased 6009 Magnolia Street for collateral and informed PMBDA in writing, that it would be used for the business as a rehearsal studio. Mr. Hess told Jones that if the property was to be used for a business purpose then the closing costs would be credited as equity. Mr. Jones spent $5,000.00 in closing costs. R. 872, 5674, 5678.

Mr. Jones had already spent over $33,000.00 on the dormant corporation, which PMBDA arbitrarily refused to accept for equity purposes. R. 796-97. This was despite that PMBDA had accepted Street Sounds as a "new" business due to its past inactivity and need for funding. R. 346, 474.

PMBDA never corresponded with Jones until the time of the loan rescission, to inform him that it did not accept his proposed equity despite that Jones wrote Hess on August 28, 1996, asking for any unresolved issues. R. 309. Mr. Hess reneged on his promise of a new commitment letter and a new closing. R. 790. There is an absence of any new

PMBDA requests for equity in Mr. Hess's writings, including requests for additional bank receipts.

While it should have been irrelevant to PMBDA for equity purposes, that Jones was receiving approximately $21,000.00 in disability payments yearly, Smith falsely testified that the equity injection was to come from those payments. R. 654-59, 681-82. Smith contradicted her testimony regarding the relevance of disability income by stating that the business had to be able to meet debt service on its' own. Also, incredibly, all of PMBDA's procedures and documentation, including the commitment letter contemplated a one-time equity injection, if it had not already been shown with business expenditures. R. 325-29, 546-48, 783-89. It was unbelievable that Smith would suggests that the equity injection could be done over a period of time with monthly income.

Totaling all of the equity that PMBDA accepted and should have accepted, at a minimum, $11,000.00 for business expenses, $5,000.00 for equipment and furniture and $5,000.00 for the closing costs on the home to be used as a rehearsal studio, Street Sounds' equity injection was $21,000.00 without any additional cash. Unbelievably Ms. Smith testified that Street Sounds was extended zero credit for equity. R. 771-73, 774-75.

PMBDA's articulated reason of insufficient collateral is equally as unconvincing as its' accusation of inability to make the equity injection. After Mr. Jones substituted 6009 Magnolia Street for 6013 Magnolia Street, his collateral position increased, not decreased from that which was originally accepted by its' Board Directors. The later

property was professionally appraised at a higher value. R. 776, 791.

By PMBDA's written procedure, the value to be allotted for collateral, was eighty percent of that which was professionally appraised. R. 792. Here, PMBDA refused to follow its own procedures for valuing collateral. In Ms. Smith's September 9, 1996 letter, not only did she not follow PMBDA's procedure for valuing collateral, she did not even bother to address all of the collateral, including the real estate at 450 E. Walnut Lane, equipment and furniture, stock, money from bank accounts and Mia Evans' contract, all of which were required as collateral by the commitment letter. R. 778-79, 783-89. Ms. Smith's misrepresenting letter was copied to Ms. White and other PMBDA employees involved in the decision to rescind the loan commitment. As Ms. Smith signed the August 18, 1995 commitment letter, her omission of the majority of the collateral in the later writing can only be construed as a purposeful act - a lie. Additionally, the PMBDA procedures do not address purchase price as a criteria in assessing the worth of the collateral, as Smith did in the September 9, 1996 letter.

By falsely giving the impression that Mr. Jones collateral level had sunk, effectively Smith unilaterally undid the deal that had been made by PMBDA's Board of Directors on July 27, 1995, when it approved the loan with a $24,000.00 real estate collateral deficiency. R. 372-76.

Regarding the ability to meet debt service, the September 9, 1996 letter again misrepresented the facts that had already been addressed at the July 27, 1995 meeting, that Street Sounds was accepted by the Board as a "new business" and that historical financial information was not relevant in assessing its' ability to repay the debt. Ms. Smith deliberately

deceived Ms. White and the Board regarding this issue. Ms. Smith's deposition testimony belies her contention that Street Sounds would be unable to meet the debt. She admitted the following: (1) that she did not disbelieve Street Sounds net sales projections, which greatly exceeded the debt. R. 716-21; (2) she knew virtually nothing about the music industry with which to gauge whether success would occur. R. 714; (3) she purposely failed to familiarize herself with the details of the loan project, which were relevant to the ability to meet debt service. R. 618; (4) she did not know key elements about the loan project including the past successes of Mr. Jones, Mia Evans, and Mr. Berstein (a consultant who had produced multiple gold selling albums and single recordings). R. 620-30.

Additionally she testified to an objective list of criteria to be used to determine if the debt could be repaid, all of which were existent in the case of Street Sounds. R. 21-25; 617-18.

Despite that Street Sounds was presented as a new business, Smith and Hess repeatedly misrepresented that it was an ongoing concern for which profits should have been derived. R. 346, 704-09. Ms. Smith sent a letter to Mr. Jones on July 27, 1995, which she testified that he could reasonably interpret as instructing him not to make new business purchases prior to the loan closing. R. 396-97, 756-59. Thus, it was totally contradictory and incoherent for her to later attempt to falsely present the impression that Street Sounds was an ongoing concern that had attempted to, but failed to make sales for four years. EXICO's presentation at the July 27, 1995 Board meeting discredited Smith's representation that the loan project was not viable. R. 346-57.

Other evidence of pretext included the following. Smith and Hess repeatedly lied that Jones did not have money available for an equity injection at the April 3, 1996 closing. R. 367, 369, 774-75. This was despite that the only person who could verify this was Mr. Osunipebi, who testified he never made such a representation to anyone. R. 807-09. Mr. Carolina testified that Smith disfavored loaning to Street Sounds and tended to make purposeful misrepresentations about projects she disfavored. R. 219-20.

Ms. Smith violated PMBDA's written procedures for loan rescindment. First, she bypassed the forum for developing resolutions for rescindment, the PMBDA Workout Committee. This Committee consisted of 7-10 people and required a consensus. R. 299, 560. The resolution for rescindent was "illegal." Smith, Hess and PMBDA refused to allow the procedurally required thirty days between the notice of the decision to rescind and the actual Board decision, allowing only 17 days. R. 299. The date of notice was September 9, 1996 and the decision occurred on September 26, 1996. R. 774-75, 826-36.

Ms. Smith violated PMBDA procedures by refusing to respond to Mr. Harper's letter requesting reconsideration. The procedure required her to respond. R. 309. Ms. Smith admitted that the decision to rescind could have been deferred in order to properly address the request for reconsideration. Smith left employment with PMBDA within four days after the decision to rescind. R. 559, 602-05. Ms. Smith purposely concealed Mr. Harper's request for reconsideration from the Board.

Other evidence included, Smith unbelievably insisting that the August 18, 1995 commitment letter explained to Jones his options to use other than cash for the equity

injection. The letter clearly suggests only a cash injection. R. 783-84. PMBDA was aware at the early stage of the loan process that Jones' Veteran's Affairs property might be restricted as collateral. R. 176. Smith threatened Jones with immediate loan rescission if he did not attend the August 12, 1996 meeting. This violated PMBDA's procedures for rescindment. R. 299. PMBDA attempted to give the false impression that Jones, rather than its' escrow agent was responsible for establishing the escrow account. R. 294, 478, 551, 5560-64. Despite the fact that in practice PMBDA excused collateral altogether if an applicant's net worth exceeded the loan amount, PMBDA refused this practice for Mr. Jones, although his net worth exceeded the loan amount by approximately $40,000.00. R.152-53, 932.

ARGUMENT

A. Summary Judgment Is Not Appropriate When There Exist Disputed Issues of Material Fact Particularly Regarding the Alleged Reasons for an Adverse Action

Summary judgment should only be granted when the evidence demonstrates that there is no genuine issue of material fact left to resolved a trial. Celotex Corp v. Catrett, 106 S. Ct. 254; 2552 (1986). To survive summary judgment, the non-movant only needs to point to evidence demonstrating the existence of a genuine dispute of material facts, requiring a jury to resolve the parties' different versions of the facts. Anderson v. Liberty Lobby, Inc. 1065 Ct. 2505, 2510 (1986); Matsushita Electric Indus. Co. v. Zenith Radio, 106 S. Ct. 1348, 1355 (1986).

At the summary judgment stage, a plaintiff need not provide evidence directly contradicting the defendant's proffered reasons. Antol v. Perry, 82 F. 3d 1291, 1300 (3d

Cir. 1996). Fuentes v. Perskie, 32 F. 3d 759, 763 (3d Cir. 1994). The nonmovant need not match item for item, each piece of evidence proffered by the movant, but must simply exceed the "mere" scintilla standard. Boyle v. County of Allegheny Pennsylvania, 139 F.3d 386, 389 (3d Cir. 1998). A plaintiff can survive summary judgment by providing sufficient evidence from which a reasonable factfinder could (not must) infer pretext. Armbruster v. Unisys Corp. 32 F.3d 768, 782-83 (3d Cir. 1994). Because discrimination cases turn on the state of mind and credibility of the defendant, summary judgment generally is inappropriate in their contexts.

The evidence laid out in the statement of the case above clearly proves that genuine material issues of fact exist regarding the PMBDA's articulated reasons for its' rescindment of a loan commitment to Street Sounds. Mr. Jones has either directly or indirectly contradicted each of the proffered reasons and must therefore survive summary judgment. In summary, perhaps foremost, Jones proved that Ms. Smith simply lied regarding the issue of collateral by intentionally misstating the collateral value in her September 9, 1996 letter. In fact, the collateral level never decreased from that which the PMBDA Board of Directors excepted on July 27, 1995.

Jones also proved that Smith purposely misrepresented facts regarding Street Sounds ability to meet the debt in the September 9, 1996 letter, by pointing to the years of lack of profit. This was after the Board had already been briefed by PMBDA's own EXICO, that Street Sounds was a "new business" for which historical financial information was not applicable. A reasonable factfinder could clearly interpret Smith's actions as intentionally deceiving. Because Street Sounds was a new business, there simply is a genuine issue

of material fact as to whether it could meet debt service as well as a genuine issue of material fact as to whether Smith and PMBDA believed debt service could be met.

As stated above, Smith did not disbelieve the projections for net profits, which exceeded the loan amount.

Finally, Jones has proven piece by piece that he obtained at least $21,000.00 in equity which satisfied the $20,000.00 equity injection. All of the expenses, including business rent, equipment to be used by the business for the business purpose and closing costs on a property to be used by the business for a rehearsal studio can be no other than legitimate equity. Moreover, Mr. Hess admitted in writing that the paid in capital exceeded $20,000.00.

Additionally if for some reason, which defendant's evidence never explained, the items were not acceptable equity, Jones proved that he was capable of making the entire equity injection in cash if necessary and his attorney pledged this would occur. It was simply false that he was not capable of making the equity injection. The Court of Appeals appears to suggest that proof of the ability to make the injection was not provided, while not addressing the issue that Jones had already proven the injection through expenditures. It erroneously construed material facts in favor of the movant in violation of the standards for summary judgment. Parasco v. Pacific Indemnity Co. 920 F. Supp. 647 (E.D. Pa. 1996); Levin v. Marder, 343 F. Supp. 1050 (D.C. Pa. 1972). The Court appears to have accepted at point blank all of defendant's reasons, particularly regarding collateral and equity, while ignoring plaintiff's evidence which call into question genuine issues of material fact. For example, the Court of Appeals' opinion suggests that PMBDA had the

right to reject the collateral at 6009 Magnolia Street merely because of its' low purchase price. This was despite that the evidence (see above) proved that professional appraisal, not purchase price was PMBDA's own documented procedure for valuing collateral.

Additionally, regarding equity, the Court of Appeals seems to discount the viability of the business equipment in total because it appears that it already belonged to Street Sounds. This was despite that Jones provided evidence that: (1) preloan investment could be counted for equity; (2) Carolina testified that the property should have been counted for equity; (3) most astoundingly, PMBDA had already credited the equipment for collateral purposes at $5,000.00. It simply is beyond belief how hard assets can have a monetary value for collateral, but those same assets have zero value for equity, despite that they are the same assets to be used to produce the music, the purpose of the loan. Finally, Ms. Smith's July 27, 1995 letter put Mr. Jones on notice that he was not to purchase new equipment prior to a loan closing. Thus, PMBDA did not contemplate that he needed new equipment to start his business. Jones has provided direct and circumstantial evidence directly rebutting every reason defendant gave for rescindment, going well beyond the mere scintilla standard. Boyle v. County of Allegheny Pennsylvania, 139 F. 3d, 386, 389 (3d Cir. 1998).

B. A Plaintiff in an Americans with Disabilities Act Title II Claim Must Survive Summary Judgment When He is Able to Prove That Discrimination Played A Part in an Adverse Action Against Him

The substantive standards for deciding discrimination cases under Title VII employment cases are applicable to

actions under the Americans With Disabilities Act (ADA). Antol v. Perry, 82 F. 3d 1291 (3d Cir. 1995).

As stated above, Jones provided an abundance of direct evidence that PMBDA's decision against him was at least based in part on disability discrimination (see statement of the case above). Direct evidence is that which requires no or little inferential step to conclude discriminatory decision making Aman v. Cort Furniture Rental Corp, 85 F.3d 1074, 1081 (3d Cir. 1996). If such direct evidence exists, the decision maker must prove that the same decision would have been made, even if it had not based its' decision on illegal considerations. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787-88 (1989).

The Court of Appeals failed to apply the standard from Price Waterhouse, supra. rather it totally discounted the evidence of discrimination as "inquiries" and as irrelevant to the issue of whether program requirements were met. This was error. The evidence provided above in the statement of the case proves that Smith's comments (reflecting her state of mind) were not inquiries, rather they were edicts that a loan could not be done. The derogatory references and inappropriate consideration of disability extended throughout the loan process. It is impossible for the Court on summary judgment to rule as a matter of law, that disability discrimination played no role in Smith's decision for loan rescindment particularly when the reasons in her September 9, 1996 letter have been discredited.

As the evidence above shows, there can be no more direct evidence, than Ms. Smith stating "we can't help, this guy is on permanent disability" R. 194. Carolina testified regarding Smith: "it was like we can't help this guy or we can't do a deal because there is disability." R. 191.

The Court of Appeals erred by not requiring proof that PMBDA would have made the same adverse decision in the absence of Ms. Smith's disability discrimination. It must be noted that Smith's comments reflect the noxious stereotyping that disabled people, particularly mentally disabled (as she believed) are not worthy of consideration in the economy, similar obviously to the sex stereotyping in Price Waterhouse v. Hopkins, supra., but more egregious. In Price Waterhouse v. Hopkins, supra, the Plaintiff was held to a standard of how women in the workplace should act, e.g. femininely. Here, Smith has decided, on behalf of PMBDA that Jones cannot even participate in the economy due to his disability, at least not if she has anything to do with it.

C. In An Americans With Disabilities Act, Title II Claim, a Plaintiff Must Survive Summary Judgment When He Produces Evidence Directly or Indirectly Contravening the Defendants Proffered Reasons for Its' Adverse Action

Discrimination may be proven circumstantially by proving by a preponderance of evidence that the decision maker's stated reasons for its' action are not the true reason or that those stated reasons are unworthy of belief. McDonnell - Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). In St. Mary Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) and more recently, Reeves v. Sanderson Plumbing Products, Inc. 197 F. 3d 688 (2000), the United States Supreme Court has held that discrimination can be proven at trial entirely by proving pretext, e.g. that no additional direct or circumstantial evidence is necessary. The jury's mere disbelief alone of a defendant's proffered reason allows a finding of discrimination. In Reeves, supra, the United States

Supreme Court reversed the Court of Appeals, because Reeves was able at trial to discredit the employer's proffered reasons for his termination. Reeves was an age discrimination case, where other employers over the age of forty were not fired or allegedly mistreated. Here, above in the statement of the case, in addition to the ample direct evidence of disability discrimination, Jones also has been able to discredit all of Smith's and PMBDA's profound reasons for loan rescindment. Not only does he prove that there are issues of material fact for a jury, he exceeds the standard by directly proving all of the reasons are patently false. It should be noted that to survive summary judgment, a nonmovant need not discredit each and every reason given, it is enough to prove the falsity of one. Roebuck v. Drexel University, 852 F.2d 715, 734 (3d Cir. 1988). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer (defendant) is dissembling to cover up a discriminating purpose. Reeves v. Sanderson, supra.

Moreover, once the decisionmaker's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the decisionmaker is in the best position to put forth the actual reason for its' decision. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) Jones evidence presented above overwhelmingly suggests that PMBDA merely did not want to loan to him because of his disability. It lied to him and about him. It violated its' own procedures over and over, evidence of discrimination. Antol v. Perry, 82 F. 3d 1291, 1300 (3d Cir. 1995).

D. In an Americans with Disabilities Act, Title II Claim, The Defendant Has an Unexcusable Burden of Proving What if Any of Its' Program Requirements are Essential Eligibility Requirements

Under the ADA, in determining what is an essential eligibility requirement, the Court cannot rest on the State's characterization of the service, nor its' qualification or eligibility criteria it asserts as necessary, but rather must make on independent inquiry. Straithie v. Department of Transportation, 716 F. 2d 277 (3d Cir. 1983). Despite the Court of Appeals finding that collateral and equity where essential, this finding was not based on any evidence whatsoever from PMBDA. Conversely, Jones provided evidence that collateral was totally excusable if an applicant's net worth exceeded the loan amount. Moreover, he presented evidence that his net worth exceeded the loan amount.

Regarding equity injection, it is undisputable that Jones provided the only proof required prior to a closing by PMBDA's own admission. R. 546. There was no requirement, and particularly no "essential" requirement that Jones preprove his ability to make the equity injection prior to the closing. It is undisputable that PMBDA reneged its' promise to schedule a closing so that the equity injection could be done. Of course, as stated above a cash injection wasn't needed because, Jones had already made the entire injection in business expenditures.

Finally, the commitment letter itself belies any contention of essential eligibility requirements in stating:

> PMBDA reserves the right to waive, in whole or part, any (emphasis added) of the terms or conditions hereof which have been inserted for PMBDA's benefit. R. 786.

Because any and all of the requirements were waivable, including collateral and equity, a reasonable jury could find that none of them were "essential" - that each loan project could be individually tailored depending on PMBDA's assessment of viability.

CONCLUSION

The orders of the United States Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania should be reversed and the case should be remanded for trial.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1644

NORMAN K. JONES

Apellant

v.

THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY; ISABELLE SMITH; EUGENE HESS

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
District Judge: The Honorable Jay C. Waldeman
D.C. Civil No. 97-cv-04486

Argued: April 27, 2000
Before: BECKER, Chief Judge, BARRY, and BRIGHT,* Circuit Judges

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JUDGEMENT

This cause came to be heard on the record from the United States District Court for Eastern District of Pennsylvania and was argued on April 27, 2000.

After consideration of all contentions raised by the appellant, it is ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

Costs are taxed against appellant.

Marcia M. Waldron, Acting Clerk

Dated: July 28, 2000

UNREPORTED/NOT PROCEDURAL
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Before: The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, Sitting by Designation

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MEMORANDUM OPINION OF THE COURT

BARRY, Circuit Judge:

Appellant Norman K. Jones appeals the District Court's grant of summary judgment on his claim of discrimination under Title II of the Americans with Disability Act ("ADA") against the Pennsylvania Minority Business Development Authority ("PMBDA"), Isabelle Smith and Eugene Hess. We exercise appellant jurisdiction pursuant to 28 U.S.C. § 1291. After reviewing the extensive record in this case, we are satisfied that the District

Court correctly granted summary judgment and, accordingly, we will affirm.

I.

The parties are eminently familiar with the facts of the case. As a result, we provide only a brief summary of those facts at the outset and will incorporate additional facts as they are relevant to our discussion of the issues.

On April 24, 1995, Jones, as the president and sole shareholder of Street Sounds Recording and Production, Co., Inc. ("Street Sounds"), applied to the PMBDA for a $60,000 business loan. The application was initially reviewed and processed by Kelbin Carolina, then the PMBDA regional representative for Philadelphia. Later in the process, the application was handled by Eugene Hess, a PMBDA economic development analyst. At all times, Isabelle Smith was the PMBDA executive director.

In his application, Jones indicated that Street Sounds "was forced to inactivate in 1992 & 1993 due to a secondary job related injury . . . [he sustained] at the U.S. Postal Service." App. At 5304. In a subsequent letter to Carolina, Jones explained that he was "permanently disabled" from his "normal occupation (postal worker) and will continue to receive monthly disability compensation indefinitely or" until he is no longer considered disabled, which he stated was "not a possibility." Id. At 5501. Jones claimed that he suffered from generalized anxiety disorder.

Smith was concerned about the extent of Jones's disability and whether it would prevent him from running the business for which he was seeking the loan. Carolina, however, told her that Jones's disability would not present a problem and it appears that the issue was, for the most part, dropped.

On July 13, 1995, Jones's loan application was presented to the Loan Evaluation Committee, which recommended to the Board of Directors that the loan be approved. The Board accepted the recommendation and approved the loan on July 27, 1995.

A commitment letter was then sent to Jones, listing the conditions he was required to meet before the loan could

close. See id. At 5532-38. As pertinent to this appeal, the following conditions were required:

> 1. Borrower shall establish at or prior to closing an escrow account at a bank acceptable to PMBDA for deposit of PMBDA funds. Escrow funds shall include Borrower's capital contribution.
>
> 2. PMBDA will require as security for this Loan: a. a second mortgage on certain real property located at 6013 Magnolia Street, Philadelphia, Pennsylvania 19144, subject only to that certain mortgage in the principal amount of $17,800 . . . .[and] b. a second mortgage on certain real property located at 450 East Walnut Lane, Philadelphia, PA 19144, subject only to that certain mortgage in the principal of $55,000 or less. Borrower shall make a capital contribution to the Project at closing in the amount of Twenty Thousand Dollars ($20,000). The Borrower shall provide proof of equity injection into the Project in the amount of $20,000, prior to losing of the PMBDA Loan.

Id. At 5532-37. The commitment letter also stated that the loan proceeds were to be used strictly for video production ($20,500), and audio and video promotion ($39,500). See id. At 5538. Thus, none of the proceeds was designated as unrestricted working capital.

A closing date was scheduled for April 3, 1996. Although the parties met on that day, the closing did not occur. The reasons for the failure appear to be two-fold. First, as Jones concedes, "[b]y the time of closing [he] had still been unable to receive back mortgage waivers on both of the properties he pledged as collateral." Appellant's Br. at 13. Second, Jones and Abayomi Osumipedi, PMBDA's escrow agent, were unable to open an escrow account at the

designated bank because the bank refused to sign PMBDA's anti-discrimination clause.

On April 3rd, Jones also informed PMBDA that he wanted to change the terms of the loan agreement. He asked to use $20,000 of the loan proceeds as unrestricted working capital. In addition, he requested a credit toward satisfaction of the equity injection for all prior business expenditures made on behalf of Street Sounds.

PMBDA partially agreed. It granted Jones permission to use $10,000 of the loan as unrestricted working capital. Furthermore, it allowed him to take a credit for prior business expenditures, but only for those made after July 1, 1995, and provided that the proper receipts were submitted. Upon learning of the approval of only $10,000 as unrestricted working capital, Jones informed PMBDA that he needed the whole loan as working capital because Street Sounds was currently non-operational. See App. at 344.

PMBDA began to question Jones's ability to satisfy the requirements of the commitment letter and, ultimately, to repay the loan. It informed Jones of its concerns on April 26, 1996:

> 1. It has come to the attention of the Authority that a second mortgage as described in item 6a [i.e., the property located at 6013 Magnolia Street] may be unattainable. Please explain why this property is unavailable for use as collateral and what collateral and what collateral of equal value will be substituted.
>
> 2. It is the understanding of the Authority that the $20,000 required at the time of closing . . . was not provided either in cash or in receipts for purchases pertaining to the business dated from July 1, 1995 or thereafter.

> 3. You indicated [in a conversation with Mr. Hess] that the business has not been in operation for approximately a year. At the July 13, 1995 [LEC] meeting, the members of the Committee were under the impression that the business was an ongoing concern . . . .

An explanation of your business operations is needed.
Id. At 74.

Jones attempted to satisfy the requirements of the commitment letter by, among other things, submitting numerous receipts and canceled checks intended to show business expenditures on the part of Street Sounds. He also purchased a new property at 6009 Magnolia Street to be used as collateral in lien of 6013 Magnolia Street.

PMBDA, however, was not convinced. It remained concerning for several reasons: (1) the canceled checks submitted by Jones as business expenditures only added up to about $11,000; (2) Street Sounds's tax returns were prepared on a modified cash basis, making it difficult to determine changes to accounts such as paid-in-capital; (3) 6009 Magnolia was appraised at $42,000, yet Jones only paid $15,000 for the property; (4) it was not clear whether the property at 6009 Magnolia would be used for the business; and (5) it was not clear whether Jones was still using his disability payments to keep Street Sounds operating. See id. At 5144. In addition, PMBDA rejected Jones's request for a credit totaling 11,731 for business equipment that he purportedly sold to Street Sounds. Although Jones contended that he sold the equipment to Street Sounds on December 18, 1995, it was discovered that Street Sounds owned the equipment as far back as 1991.

On September 26, 1996, despite Jones's insistence that he could satisfy the requirements of the commitment letter, the PMBDA Board voted to rescind the loan. Following the rescission, Jones filed the present action in the United States District Court for the Eastern District of Pennsylvania, alleging that PMBDA and its officers rescinded the loan on account of his disability.

II.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services . . . provided by a public entity." Id. § 12131(2).

A plaintiff establishes a prima facie case of disability under the ADA by showing: (1) that he or she has a disability; (2) that he or she is otherwise qualified; and (3) that he or she has suffered an adverse decision as a result of discrimination. See Shaner v. Synthes, 200 F.3d 494, 500 (3d Cir. 2000). It is the plaintiff's burden to establish that he or she is otherwise qualified to receive the benefits he or she was denied. See Walton v. Mental Health Ass'n of S.E. PA. 168 F. 3d 661, 670 (3d Cir. 1999). If the plaintiff satisfies this initial burden, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the denial. See id. At 668. Finally, if the defendant articulates a legitimate, nondiscriminatory reason, the plaintiff can defeat summary judgment only by "[p]ointing to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's

articulated legitimate reasons; or (2) believe than an invidious discriminatory reason was more likely than not a motivating or determinative cause of the [defendant's] action." Id. (quoting Lawrence v. National Westminister Bank N.J., 98 F. 3d 61, 66 (3d Cir. 1996).

The District Court found that Jones was an individual with a disability for purposes of the ADA and appellees do not vigorously contest this issue. A review of the record shows that Jones's evidence of disability is, at best, questionable. Nonetheless, given our ultimate disposition of the claim, we will assume, for the limited purpose of this appeal, that Jones has a disability within the ambit of the ADA.

The pertinent issue in this case is whether Jones is a "qualified individual." The District Court determined that Jones was not qualified because he failed to meet the eligibility requirements set forth in the commitment letter. First, the Court stated that "i]t is uncontroverted that the scheduled closing fell through because plaintiff had not obtained the mortgage waivers." The Court noted that it was understandable for PMBDA to have rejected the substituted collateral, i.e., 6009 Magnolia Street, because "[a]ny prudent lender would be skeptical about a claim that one had sold his property . . . for $22,000 less than and barely 40% of the market price." Second, the Court noted that Jones failed to satisfy the $20,000 equity injection. The Court pointed out that Jones attempted to use "a purported transfer of $11,731 worth of equipment from [himself] . . . to Sound Streets for which plaintiff did not have dated receipts or comparable evidence of market value." The Court also rejected Jones's argument that he had presented proof of his ability to make a cash injection. The Court explained that "[w]ith his statement of September 24, 1996 that a cash injection [was]

still possible, plaintiff provided no supporting evidence or explanation of when or how such an injection be made.

We agree with the District Court that Jones failed to meet the requirements set forth in the commitment letter and, consequently, did not qualify for the PMBDA loan. The evidence indicates that Jones as not able to obtain mortgage waivers on the properties he pledged as collateral at the time of the scheduling closing and Jones concedes as much. Although he argues that he attempted to substitute the original collateral with the property at 6009 Magnolia, as the District Court pointed out, the value of that property was highly suspect. In addition, Jones did not present evidence to support his contention that he could, in fact, meet the required equity injection. Many of the bank statements Jones submitted are dated later than the loan rescission and, therefore, were not relevant to PMBDA's decision to rescind the loan. Further more the $11,731 in business expenditures which Jones submitted as part of the equity injection requirement was rejected by PMBDA as a "sham" transaction - a characterization firmly supported by the record. Ultimately, it was Jones's burden to establish that was qualified to receive the benefit, i.e., that he satisfied the loan requirements. He failed to do so.

We reject Jones's contention that the collateral and equity injection requirements were not "essential" to receiving the PMBDA loan. Jones submits that PMBDA "approved loans with hundreds of thousands of dollars in collateral deficiency and did not even regard [his] collateral deficiency as substantial." Carolina explained in hid deposition testimony, however, that some loans were indeed approved without collateral, but only where the borrower's "total assets exceeded the loan amount." Jones provided no evidence which would indicate that this was his situation. Furthermore, Jones's reliance on an audit report indicating that loans were made with collateral deficiencies is

misguided. PMBDA had been threatened with termination because of its poor default rate and, as the District Court opined, "it is nonsensical to suggest that PMBDA was obliged to continue to engage in the kind of conduct which jeopardized its funding and resulted in the highly critical audit report."

Jones argues, nonetheless, that there was direct and circumstantial evidence of discrimination on the part of PMBDA and its officers. In support, he points to several occasions on which Smith questioned whether Jones's disability would present a problem.

With two exceptions, however, there inquiries all occurred before July of 1995 and, hence, prior to PMBDA's approval of Jones's loan application. There is, therefore, no "link" between these allegedly discriminatory remarks and the adverse decision, i.e., the loan rescission, which occurred over a year later. See Bailey v. Amsted Indus., Inc., 172 F. 3d 1041, 1045 (8th Cir. 1999) ("[Plaintiff] failed to establish a prima facie case of discrimination [under the ADA] because he failed to show that his discharge occurred under circumstances that raise an inference of unlawful discrimination."); see also Greer v. Emerson Elec. Co., 185 F.3d 917, (8th Cir. 1999)(no prima facie case of discrimination under the ADA "because the record contains no evidence from which to reasonably infer that [her] discharge was on account of an actual or perceived disability.")

Moreover, although PMBDA was obviously aware of Jones's disability at the time it rescinded the loan - indeed, he had told PMBDA of his disability when he applied for the loan - that awareness, alone, does not establish that the disability was the basis for the rescission. See Kelly v. Drexel Univ., 94 F. 3d 102, 108 (3d Cir. 1996) ("[W]e hold that the mere fact that an employer is aware of an employee's

impairment is insufficient to demonstrate either that the employer regarding the employee as disabled or that that perception caused the adverse employment action.").

The two statements made after the loan was approved, which Jones contends evidence that his disability was the basis for the rescission, are equally unconvincing. The first is an e-mail which Ms. Smith sent to Emily White on April 23, 1996:

> "Gene [Hess] spoke to Abayomi [Osumipedi] and this client did not have the $20,000 equity injection as per the loan documents. This entire situation is suspect. In the LEC meeting last year this client indicated that this business was in operation. Karen and I both questioned the client because he had been receiving disability from a work related injury. PMBDA will send a letter to the client to have a meeting to discuss this matter and possibly with for May. Can we refuse to disburse a loan when there is adverse information? Kelbin was the Rep on this deal and there could not have been proof of the equity injection prior to coming to the LEC if these types of problems are now coming to light." App. at 775. The second is found in Ms. Smith's deposition testimony in which she responded to the question "[d]id you discuss the issue of disability with Eugene Hess [at the time you drafted the resolution for rescission of the loan] "by stating: "I may have, in regards to whether his disability payments were continuing, if he still had a source of income, because the source of income was not on his tax statements."

App. At 564. These isolated references to Jones's disability, however, are consistent with PMBDA's overall concern with Jones's ability to satisfy the loan requirements and repay the loan. As the District Court explained: "Plaintiff himself

informed defendants of his disability and stated it was the reason his business had been inactive in the past. Ms. Smith and any others asked to approve plaintiff' loan application had a legitimate interest in determining whether plaintiff's disability would prevent him from managing and working full-time in the future at Street Sounds as required by PMBDA regulations." The few times that Jones's disability was mentioned in connection with his loan application, therefore, do not support his contention that he suffered an "adverse . . . decision as a result of discrimination." Gaul v. Lucent Techs, Inc., 134 F. 3d 576, 580 (3d Cir. 1998). In sum, although many questions arose during the entire loan approval process regarding Jones's ability to repay the loan and the risks involved in granting him the loan, there is no evidence that any of them implicated his disability in order than a wholly nondiscriminatory manner.

III.

In conclusion, we are persuaded that Jones has failed to establish a prima facie case of disability-based discrimination under the ADA. Despite Jones's contentions to the contrary, the record indicates that it was his failure to satisfy the loan requirements, and not his disability, that ultimately resulted in the rescission of his loan. Thus, we find that "there exists no genuine issue of material fact that would permit a reasonable jury to find" that the rescission of the loan was the "result of discrimination." International Union, United Auto, Aerospace & Agric. Implement Workers of America v. Skinner Engine Co., 188 F. 3d 130, 137 (3d Cir. 1999) quoting Miller v. Indiana Hosp., 843 F. 2d 139, 143 (3d Cir. 1988). Accordingly, we will affirm the judgment of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

_____

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN K. JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY, ISABELLE SMITH and EUGENE HESS	:	**NO. 97-4486**

ORDER

AND NOW, this day of , consistent with the accompanying memorandum, IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is DENIED; defendants' Motion for Summary Judgment is GRANTED; and, accordingly JUDGMENT is ENTERED in the above action for the defendants

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN K. JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY, ISABELLE SMITH and EUGENE HESS	:	**NO. 97-4486**

MEMORANDUM

I. Background

Plaintiff has asserted claims under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133, and the Rehabilitation Act of 1073, 28 U.S.C. § 294(a). He alleges that defendants denied him a loan because he is disabled. He seeks "compensatory and punitive damages" for "physical and emotional injury," "mental anguish" and "economic injury."

Presently before the court are the parties' cross motions for summary judgment.

II. Legal Standard

When consideration a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inference from the record are drawn in favor of the non-movant. Id. At 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F. 2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F. 2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

While the parties clearly differ on the conclusions to be drawn, the pertinent facts are essentially uncontroverted. They are as follows.

Plaintiff was a postal worker from 1988 to October 1991. Plaintiff is now the president and sole shareholder of Street Sounds Recording and Production Co., Inc. ("Street Sounds"). In 1991, while employed by the U.S. Postal Service, plaintiff was the subject of an internal sexual harassment investigation. As a result, he developed a stress-related condition which was originally diagnosed as an "adjustment disorder with mixed emotional features." The diagnosis was later changed to "generalized anxiety disorder." plaintiff's condition involves "difficulty concentrating, mistrust of all authority figures and feelings of being on edge," as well as a "greatly decreased sex drive" and "sleeping difficulties." Plaintiff was "not able to work in any structured work situation" resembling the postal service. Plaintiff has received workmen's compensation from the U.S. Department of Labor since 1993.

Defendant Pennsylvania Minority Business Development Authority ("PMBDA" is an agency of the Commonwealth of Pennsylvania created for the purpose of providing low-interest loans to minority-owned and operated businesses. At all times relevant to this action, defendant Isabelle Smith was the PMBDA executive director and defendant Eugene Hess was a PMBDA economic development analyst.

By early 1995, the PMBDA had become the subject of considerable criticism because of the high delinquency and default rates of its loans. In January 1995, the Pennsylvania House of Representatives passed a resolution that no new funds would be appropriated by the House for the PMBDA

until a comprehensive audit was conducted. See House Resolution 25 (1995). The resulting audit was completed in May 1995. The audit report criticized the PMBDA, inter alia, for lack of controls over loan documentation resulting in "potential losses due to loans being approved without merit or inadequate collateral coverage."

On April 24, 1995 plaintiff applied to the PMBDA for a $60,000 business loan for Street Sounds. He presented a business plan according to which the funds would be used to record and to market rhythm and blues and rap music. Although Street Sounds was incorporated in 1991, the proposal was pitched as a start-up plan because the business had been relatively inactive due to plaintiff's lack of capital and disability.

Plaintiff stated in his application that he was on disability status from the U.S. Postal Service and was receiving monthly disability checks. In a letter of May 18, 1995, plaintiff noted that he could use these payments as working capital and to service the loan.

Plaintiff's initial contact as the PMBDA was Kelbin Carolina, then the PMBDA regional representative for Philadelphia. In November 1995 Mr. Carolina's position was terminated. After Mr. Carolina's departure, Mr. Hess took over as plaintiff's contact. Mr. Carolina had formed a positive opinion of plaintiff and his business proposal. When Mr. Carolina presented the application to Ms. Smith, she noted plaintiff's receipt of disability payments and expressed a concern about "whether (plaintiff) could manage the business" for which the loan was sought as required by PMBDA regulations. She also expressed skepticism about the merits of the business proposal. Mr. Carolina told Ms. Smith that he believed that plaintiff was competent and able to manage Street Sounds.

Ms. Smith also objected to plaintiff's plan to run the business out of his residence and required that some business address be established. Plaintiff agreed to designate 2318 Rosemarie Avenue, where he had previously been residing, as Street Sound's business address.

Plaintiff's application was presented to the Loan Evaluation Committee on July 13, 1995. The committee voted to recommend approval of plaintiff's loan to the PMBDA Board of Directors. The Board met on July 27, 1995 and voted to approve the loan, subject to the fulfillment by Street Sounds of certain conditions. The PMBDA notified defendant by commitment letter dated August 18, 1995 of its approval and of the conditions required of Street Sounds.

In accordance with PMBDA standard procedures, plaintiff was to provide at closing an "equity injection" equal to 25% of the total business project costs of $80,000 and to secure the loan with sound mortgages on his real property at 6013 Magnolia Street and 450 East Walnut Lane. The commitment letter also restricted the use of the loan funds to video production and audio and video promotion instead of unrestricted working capital. The letter notified plaintiff that the commitment would expire on November 30, 1995. In December, plaintiff requested and obtained a ninety-day extension of the loan commitment to February 28, 1996.

A closing was scheduled for April 3, 1996. The closing did not go through because plaintiff had not obtained mortgage waivers on the properties at 6013 Magnolia Street and 450 E. Walnut Lane. Plaintiff also stated that he wished to change the terms of the loan agreement.

On April 4, 1996 plaintiff requested that Street Sounds be allowed to use $20,000 of the loan proceeds as unrestricted working capital and that Street Sound's prior expenditures be credited towards satisfaction of the $20,000

equity injection requirement. The PMBDA agreed to amend the terms of the proposed loan to allow $10,000 of the proceeds to be used as unrestricted working capital and to credit Street Sounds for any purchases made after July 1, 1995, the month the application had been approved. On April 22, 1996, plaintiff renewed his request to allocate $20,000 of the proceeds for unrestricted working capital. This response was not approved.

About one month later, plaintiff obtained a mortgage waiver on the 450 E. Walnut Lane property. By letter of April 26, 1996, Ms. Smith informed plaintiff that the PMBDA was concerned that he had still failed to obtain a mortgage waiver on the property at 6013 Magnolia Street and that he had not provided the equity injection in cash or receipts for purchases.

Plaintiff responded by letter of July 16, 1999 that he wished to substitute a newly acquired property at 6009 Magnolia Street. Plaintiff also submitted canceled checks showing expenditures by Street Sounds after July 1, 1995 of almost $11,000 for rent and utilities on the Rosemarie Avenue Apartment and a copy of corporate minutes stating: "on December 18, 1995 Street Sounds Recording and Production Co., Inc. agreed to purchase equipment and convert loans from stockholders into paid in capital. Equipment purchased from stockholders on December 18, 1995 totaled $11,731.00." No receipts were provided for the equipment.

On August 12, 1996 plaintiff met with Mr. Hess to discuss the unresolved issues regarding his loan application. Mr. Hess informed plaintiff that the PMBDA would not accept the corporate minutes as evidence that he had in fact provided $11,000 worth of equipment and that the PMBDA was concerned about the collateral value of the 6009

Magnolia Street property and lack of success of Street Sounds over the previous five years.

According to the documentation submitted by plaintiff the property at 6009 Magnolia Street was appraised at $42,000 only nine days after he purchased it for $15,000 with a $10,000 mortgage. Plaintiff's explanation was that he purchased the property from a friend at substantially below market value and made $5,000 worth of renovations. The PMBDA required further proof of the claimed market value of the property. None was forthcoming.

On August 28, 1996, plaintiff submitted a receipt made out and signed by himself showing the transfer of equipment valued at $11,731 to Street Sounds in December 1995. No receipts of the underlying purchases or evidence of the equipment's market value were provided. Defendants rejected this documentation as evidence of capital contribution for the equity injection requirement.

By letter of September 9, 1996, Ms. Smith notified plaintiff that the PMBDA intended to rescind the loan commitment because he had not made the required equity injection, did not provide sufficient collateral and had not presented sufficient evidence of likelihood that he could meet the projected debt service. The PMBDA declined to accept copies of bank statements from April 1995 showing $27,000 as proof of plaintiff's assets and ability to make a capital contribution in September 1996. On September 24, 1996, plaintiff requested the PMBDA to reconsider and stated that he had provided "near total collateral" and that a capital contribution was "still possible." No new evidence of collateral or of plaintiff's capacity to make the equity injection was provided. On September 26, 1996, the PMBDA Board voted to rescind the commitment to lend $60,000 to Street Sounds and so advised plaintiff by correspondence of that date.

IV. Discussion

A. The ADA Claim

To establish a violation of Title II of the ADA a plaintiff must show that he was a qualified individual with a disability, that he was denied the benefit of a public program or service or otherwise discriminated against, and the discrimination or denial of the benefit was due to his disability. See 42 U.S.C. § 12132; Weinreich v. Los Angeles County Metropolitan Transp. Authority, 114 F. 3d 976 (9th Cir. 1997), cert. denied 118 S. Ct. 423; Adelman v. Dunmire, 1997 WL 164240, at 1 (E.D. Pa. March 28, 1997), aff'd, 149 F. 3d 1163 (3d Cir. 1998). The parties do not dispute that plaintiff was denied the benefit of the loan program provided by the PMBDA. Defendants argue that plaintiff was not disabled, was not qualified and was not in any event denied a loan for any reason related to his claimed disability.

For the purposes of the ADA, "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102. Jerry Cimmet, a psychologist, states in his report that plaintiff has suffered from "generalized anxiety" since at least November 1993. Defendants challenge that this impairment limits a major life activity.

Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" Taylor v. Phoenixville School Dist. 174 F. 3d 142, 152 (3 Cir. 1999) (quoting 29 C.F.R. § 1630.2(I)) Plaintiff contends that his generalized anxiety disorder causes him to be substantially

impaired in the major life activities of working, interacting with people, sleeping, concentrating and functioning sexually.

When considering impairments of activities other than working, the inquiry is directed at comparing the plaintiff's ability compared with the "average person in the general population." Mondzelewski v. Pathmark Stores, Inc., 162 F. 3d 778, 783 (3d Cir. 1998). An individual is substantially limited in working where there is "a significant restriction in the ability 'to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill and abilities.'" Mondzelewski, 162 F. 3d at 783 (quoting 29 C.F.R. § 1630.2(j)(3)(I). Dr. Cimmet's conclusion that plaintiff is unable to work in a structured work situation is sufficient to show that he is restricted from performing most of the jobs for which he would otherwise be qualified.

Defendants assert that even if plaintiff was disabled at the time of his application, he was not a qualified individual with a disability. A "qualified individual with a disability" is "an individual with a disability who, with, or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services." See 42 U.S.C. §12131(2). "Essential eligibility requirements" are those reasonably necessary to accomplish the purpose of the program. See Pottggen v. Missouri State High School Activities Ass'n, 40 F. 3d 926, 931 (8th Cir. 1994); Bowers v. National Collegiate Athletic Ass'n, 974 F. Supp. 459, 466 (D.N.J. 1997).

Defendants argue plaintiff did not meet the eligibility requirements specified in the commitment letter and that those requirements were essential to the loan program. It is uncontroverted that the scheduled closing fell through

because plaintiff had not obtained the mortgage waivers. Defendants assert that the loan was ultimately rescinded because plaintiff never showed the ability to satisfy the terms of the commitment letter.

Plaintiff states that he satisfied the collateral requirement by substituting the 6009 Magnolia Street property for the 6013 Magnolia Street property. Defendants rejected the substitution due to their concern that plaintiff was substantially overstating this equity in the 6009 Magnolia Street property. Any prudent lender would be skeptical about a claim that one had sold his property, even to a friend, for $22,000 less than and barely 40% of the market price. Defendants' desire for further proof of the claimed market value was consistent with sound lending policies essential to the operation of the PMBDA program.

Defendants contend plaintiff also failed to present proof that he was able to make the required $20,000 equity injection. Plaintiff states that he presented receipts showing purchases by Street Sounds of nearly $22,000. Over half of this amount, however, consisted of a purported transfer of $11,731 worth of equipment from plaintiff to Street Sounds for which plaintiff did not have dated receipts or comparable evidence of market value. Depreciation schedules he provided indicated the equipment was old and had been largely depreciated.

Plaintiff asserts that he presented proof of the capacity to make the $20,000 equity injection in cash. He refers to the copies of 1995 bank statements. In accordance with PMBDA policy, this was rejected as too old to prove plaintiff's current capacity to make the capital contribution. Mr. Carolina's uncontroverted deposition testimony is that the policy of the PMBDA was not to rely on old bank statements but to require current verification of the ability to make a cash equity injection. It is uncontroverted that

plaintiff did not submit updated records of bank deposits. With his statement of September 24, 1996 that a "cash injection [was] still possible," plaintiff provided no supporting evidence or explanation of when or how such an injection could be made. Plaintiff has presented no evidence that he demonstrated to defendants an ability to meet the equity injection requirement.

Defendants assert with force that collateral and equity injection were essential eligibility requirements. PMBDA regulations require that any loan recipient "pledge and maintain real and personal property as collateral, in the form and amount necessary to reasonably assure payment of the loan in the event of default or bankruptcy." See 12 Pa. Code § 81.112(a)(3). "At least 25% of the eligible project costs shall be contributed in cash from sources other than the authority." See 12 Pa. Code § 81.112(a)(3). These requirements clearly are designed to ensure the credit worthiness of borrowers, to protect public funds, to avoid defaults and to help ensure the availability of funds for future qualified applicants.

Plaintiff points to a statement in Mr. Carolina's affidavit that some loans were provided without collateral. He overlooks, however, Mr. Carolina's explanation that such loans had been approved only where the borrower's "total assets exceeded the loan amount." There is no evidence that plaintiff presented proof of assets exceeding the loan amount. There is also no evidence that any such loan was made after the General assembly threatened to terminate funding because of the default rate. Plaintiff also points to the report of the audit of the PMBDA, which notes that several loan files contained no documentation of collateral. The report did not state, however, that the loans had been approved without sufficient collateral. Moreover, it is nonsensical to suggest that the PMBDA was obliged to continue to engage

in the kind of conduct with jeopardized its funding and resulted in the highly critical audit report.

Plaintiff points to a statement in PMBDA's Operational Manual which provides: "[t]hat portion of the 25% equity contribution spent prior to submitting the application can be considered on a case-by-case basis, given the approval of the Executive Director." Plaintiff presents no evidence that he requested such approval or could have demonstrated sufficient prior expenditures to satisfy the requirement. Plaintiff presented no evidence to the agency to substantiate the value of equipment for which he sought a credit. Moreover, the Operational Manual also provides that as of July 7, 1994, the equity injection "must be from business savings (investment account) or cash equity (personal savings account), "which would preclude satisfaction of the equity injection requirement by prior expenditures.

The ADA requires that a reasonable accommodation be made for an individual's disability, so that he is not disadvantaged by reason of the disability, so that he is not disadvantaged by reason of the disability. It does not require that an individual must be accommodated because he happens to have a disability. Plaintiff does not contend that he failed to meet the terms of the commitment letter for reasons related to his anxiety or that he could have satisfied the essential eligibility requirements for a PMBDA loan if the affects of his disability were accommodated. The PMBDA operates a loan program and not a grant program. It is clear that giving money to applicants without adequate collateral, capital or equity would fundamentally alter the program and impose an undue burden from increased defaults and depletion of funds for credit worthy borrowers.

Even if the collateral and equity injection requirements were non-essential, the denial of plaintiff's loan

request for the reason that he failed to meet the terms of the commitment letter was not disability discrimination. A public agency does not engage in disability discrimination. A public agency does not engage in disability discrimination when it denies benefits to a disabled person who does not meet conditions of the program unrelated to the applicant's disability. See Bowen v. American Hosp. Ass'n, 476 U.S. 610, 630 (1986) (no discrimination where hospital refused to treat child who had not satisfied hospital requirement of parental consent); Sandison v. Michigan High School Athletic Ass'n, Inc., 64 F. 3d 1026, 1030 (6th Cir. 1995) (no discrimination where disabled student was denied participation in athletic program because of age); Lucero v. Hart, 915 F. 2d 1367, 1372 (9th Cir. 1990) (employee with emotional disability fired because she could not meet typing requirement). Plaintiff has presented no evidence that his failure to meet the collateral and equity injection requirements was occasioned by his disability.

Plaintiff contends that the PMBDA discrimination against him by imposing stricter requirements on Street Sounds than it did on other applicants. He points to the statement of Mr. Carolina that the PMBDA had funded home-based businesses. Nowhere in the record, however, is any information provided regarding the nature of those home-based businesses. It is clear that some businesses can more successfully be operated out of the home than can others. There is no evidence that these other businesses were similar to Street Sounds. Moreover, the requirement that Street Sounds have a business address was not related to the denial of the loan.

Plaintiff also contends that he should have been given more time to fulfill the loan requirements. By letter of April 12, 1996, Mr. Hess warned plaintiff of the importance of timely completion of the loan requirements. Mr. Hess explained to plaintiff defendants' concerns at their August

12, 1996 meeting. It is uncontroverted that Ms. Smith warned plaintiff again of the problems in her letter of September 9, 1996. Plaintiff's response on September 24, 1996 did not demonstrate that even with still more time he had the ability to satisfy the terms for a loan.

Plaintiff states that other loans had been approved after a longer delay, relying on the PMBDA audit report. He fails to note, however, that the report was very critical of the length of the process and that the agency was encouraged to take steps to ameliorate the problem. Also, there is no indication that these loans involved applicants who failed to demonstrate the capacity to meet the requirements for a loan. Moreover, it is uncontroverted that the loan commitment was rescinded only when after more than five months of discussions with plaintiff subsequent to the failure of the scheduled closing and well after the expiration of the extension of the loan commitment, plaintiff was still unable to demonstrate an ability to satisfy the terms. From the evidence presented, one could not reasonably conclude that defendants discriminated against plaintiff by not giving him sufficient time to satisfy the terms of the commitment letter.

Plaintiff finally contends that defendants demonstrated bias by questioning him about his disability. That defendants questioned him about the extent or affect of his disability is not evidence of discrimination. Plaintiff himself informed defendants of his disability and stated it was a reason his business had been inactive in the past. Ms. Smith and any others asked to approve plaintiff's loan application had a legitimate interest in determining whether plaintiff's disability would prevent him from managing and working full-time in the future at Street Sounds as required by PMBDA regulations. See 12 Pa. Code § 81.111(a)(6) & (7).

Once plaintiff assured the PMBDA that he could and would fulfill the management and full-time work requirements, the loan application was approved and indeed the loan commitment was even extended. Defendants worked with plaintiff for over sixteen months in an effort to grant him a loan. The loan approval was rescinded only after plaintiff failed at the scheduled closing, during the extended commitment period and thereafter to satisfy the terms to which he agreed and on which the loan was approved.

From the record presented, one simply cannot reasonably find that defendants' reasons for ultimately denying the loan were untrue or that the decision was motivated by or related to plaintiff's general anxiety condition.

B. Rehabilitation Act Claim

The Rehabilitation Act applies only to programs receiving federal assistance. See 29 U.S.C. § 794(a); Shiring v. Runyon, 90 F. 3d 827, 830 (3d Cir. 1996). It is uncontroverted that the PMBDA does not receive federal funds.

V. Conclusion

Plaintiff has not sustained his claims. One cannot reasonably find from the competent evidence of record that defendants' stated reasons for denying plaintiff a loan were untruthful or that they discriminated against him because of his disability. There is no evidence that plaintiff's disability is what prevented his qualification for the benefit in question.

Accordingly, defendants' motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 99-1644

NORMAN K. JONES

Apellant

v.

THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY; ISABELLE SMITH; EUGENE HESS

Appellees

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and BRIGHT* Circuit Judges

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SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT

Circuit Judge

DATED: October 31, 2000

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*The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, limited to panel vote only.